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IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF ARIZONA

16 In re:	)	In Proceedings Under
17 BCE WEST, L.P., et al.,	)	Chapter 11
18 Debtors.	)	Case Nos. 98-12547 through
19 EID: 38-3196719	)	98-12570-ECF-CGC
20	)	Jointly Administered
21	)	<b>JOINT PRETRIAL STATEMENT AND</b>
	)	<b>ORDER</b>

22 Pursuant to Rule 16, Fed. R. Civ. P., Rule 7016, Fed. R. Bankr. P., and order  
23 of this Court, WSG Development Company ("WSG"), Lebcon Associates ("Lebcon") and  
24 David R. and Becky C. Smith (collectively, "Smith") by and through their respective  
25 undersigned attorneys, hereby stipulate, confirm and agree as follows and the Court hereby  
26 Orders as follows:

1     **I.       NATURE OF ACTION.**

2           This action arises pursuant to a Motion To Determine Proper Purchaser And Price For  
3 Store #2374 (the "Motion") filed by Boston Chicken, Inc. ("Boston Chicken") and BC Real  
4 Estate Investments, Inc. (collectively, the "Debtors") arising out of the Debtors' Fifth Motion  
5 to sell real property outside of the ordinary course of business of the Debtors' business  
6 located at Docket #736) (the "Sale Motion"). One of the properties to be sold pursuant to the  
7 Sale Motion was designated and referred to as store #2374 located in Chattanooga,  
8 Tennessee ("Store #2374"). A hearing was held on the Sale Motion on April 27, 1999 at  
9 which Smith was the successful bidder. After this Court confirmed the sale of Store #2374 to  
10 Smith, Lebcon gave notice of the exercise of a right of first refusal. The Debtors thereafter  
11 filed the Motion to, among other things, determine the proper purchaser of Store #2374. The  
12 hearing on the Motion was set for June 29, 1999. Smith appeared at the hearing through  
13 counsel and Lebcon and its assignee or designee, WSG, appeared through counsel. This  
14 Court set the matter for trial for July 16, 1999 at 9:00 a.m. at which time this Court is to hear  
15 and determine the issues related to the Motion.

16     **II.       STATEMENT OF JURISDICTION.**

17           This Court has jurisdiction of this matter pursuant to 28 U.S.C. §§ 1334 and 157. This  
18 matter is a "core" proceeding. 28 U.S.C. § 157(b)(2)(A), (K), and (O). This matter is a  
19 contested matter pursuant to Rule 9014, Fed. R. Bankr. P.

20     **III.       STIPULATION OF PARTIES AS TO TRIAL PROCEDURES.**

21           Based upon the nature of the action and the extent of the stipulated facts, the parties  
22 have agreed that should the testimony of a representative(s) of Lebcon be necessary, such  
23 testimony may be by telephone. Any other testimony, if any, will be by live witnesses. The  
24 parties also intend to present oral argument at the trial.

1 **IV. ADMITTED FACTS THAT REQUIRE NO PROOF.**

2 The parties agree that the following facts are deemed relevant and are admitted and  
3 require no further proof.

4 A. Lebcon is the original owner and developer of the property known as Lot 30,  
5 Hamilton Place Mall Shopping Center, Chattanooga, Tennessee (the "Property") which is the  
6 property on which Store #2374 is located.

7 B. On July 6, 1993, Lebcon conveyed the Property to Donald Poole pursuant to  
8 Limited Warranty Deed dated July 6, 1993 and recorded in the Register's Office of Hamilton  
9 County, Tennessee in Book 4182 beginning at page 965 (the "Deed").<sup>1</sup>

10 C. The Deed contains, among other things, a reservation by Lebcon of a right of  
11 first refusal with respect to the Property upon the terms and conditions contained in the Deed  
12 and an easement in favor of Lebcon.

13 D. Since the original conveyance of the Property from Lebcon to Poole, there have  
14 been other conveyances of the Property, including the conveyance to the Debtors  
15 (collectively, the "Subsequent Deeds").<sup>2</sup>

16 E. Lebcon is the owner and developer of the Hamilton Place Mall Shopping Center  
17 which is the largest shopping mall in Tennessee (the "Mall").

18 F. Lebcon continues to own property in and around the Mall, including property  
19 which is adjacent to the Property.<sup>3</sup>

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1 The Deed is stipulated into evidence as Exhibit A. See, Section VII below.

24 2 The Subsequent Deeds have been stipulated into evidence as Exhibits B, C and  
25 D, respectively.

26 3 The Master Site Plan showing the Mall and the property which is owned by  
Lebcon has been stipulated into evidence as Exhibit G.

1 G. On October 11, 1996, Lebcon consented to the transfer of the Property to one  
2 of the Debtors, BC Superior, L.L.C. and, pursuant to the Deed, waived its right of first refusal  
3 with respect to that transfer.<sup>4</sup>

4 H. Sometime prior to April 8, 1998, Boston Chicken requested Lebcon to waive its  
5 right of first refusal contained in the Deed with respect to a proposed sale of the Property.

6 I. By letter dated April 8, 1998, Lebcon agreed to waive its right of first refusal as  
7 to that transaction only.<sup>5</sup>

8 J. On October 5, 1998 (the "Petition Date") the Debtors filed voluntary petitions for  
9 relief under 11 U.S.C. Chapter 11 in the United States Bankruptcy Court, District of Arizona.

10 K. Pursuant to 11 U.S.C. §§1107(a) and 1108, the Debtors are operating their  
11 businesses and managing their properties as debtors in possession.

12 L. On January 4, 1999 Boston Chicken, through its counsel, Brownstein Hyatt  
13 Barber & Strickland, P.C. ("Brownstein") provided notice to Lebcon of a offer on the Property  
14 (accompanied by a copy of the proposed purchase and sale agreement).<sup>6</sup>

15 M. On January 27, 1999 Lebcon advised the Brownstein of its waiver of the right  
16 of first refusal.<sup>7</sup>

17 N. Smith entered into a purchase and sale agreement with Boston Chicken dated  
18 March 23, 1999 (the "Sale Agreement") for a purchase of the Property.<sup>8</sup>

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22 <sup>4</sup> The October 11, 1996 letter is stipulated into evidence as Exhibit H.

23 <sup>5</sup> The April 8, 1998 letter is stipulated into evidence as Exhibit I.

24 <sup>6</sup> The January 4, 1999 letter and offer are stipulated into evidence as Exhibit J.

25 <sup>7</sup> The January 27, 1999 letter is stipulated into evidence as Exhibit K.

26 <sup>8</sup> The Sale Agreement is stipulated into evidence as Exhibit F.

1 O. Boston Chicken sent to Lebcon a letter giving notice of the Sale  
2 Agreement.<sup>9</sup> The letter is dated April 2, 1999.<sup>10</sup>

3 P. The April 2 letter was not accompanied by a copy of the Sale Agreement.

4 Q. Lebcon requested a copy of the Sale Agreement and the copy of the Sale  
5 Agreement was received by Lebcon on April 10, 1999.

6 R. On or about April 5, 1999, the Debtors filed the Sale Motion, which included a  
7 request to approve the sale to Smith along with a request to approve the sale of various other  
8 properties of the Debtors. In the Sale Motion, the Debtors moved, among other things, for  
9 authority to sell the Property pursuant to the terms of the Sale Agreement.

10 S. Pursuant to the Amended Certificate Of Service filed by the Debtors on or about  
11 April 6, 1999, the Sale Motion was noticed only to the parties on the Master Service List #7  
12 dated March 15, 1999 ("List #7").

13 T. Neither Lebcon nor WSG is listed in List #7.

14 U. Neither Lebcon nor WSG received Debtors' notice of hearing of the Sale Motion  
15 from the Debtors or any other party.

16 V. On April 27, 1999 this Court held a hearing on the Sale Motion (the "Sale  
17 Hearing").

18 W. Smith appeared at the Sale Hearing by telephone and the offer as contained in  
19 the Sale Agreement \$800,000 was the only bid on the Property at the Sale Hearing.

20 X. On May 12, 1999, this Court entered the order, among other things, confirming  
21 the sale of the Property to Smith.

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24 <sup>9</sup> The April 2 letter is stipulated into evidence as Exhibit L.

25 <sup>10</sup> There is some dispute regarding the date that Lebcon received the letter. The  
26 parties will either stipulate at the time of trial as to the date of receipt or will present evidence  
regarding the date of receipt at trial.

1 Y. On May 21, 1999 Lebcon gave notice to the Debtors of its exercise of the right  
2 of first refusal.<sup>11</sup>

3 Z. On or about June 8, 1999, the Debtors filed the Motion.

4 AA. Smith intends to use the Property for a Panera Bakery and Cafe.

5 BB. There is already a bakery in the Mall, Atlanta Bread Company.

6 CC. Lebcon has not transferred the right of first refusal and nor its rights as the  
7 beneficiary of the restrictions and covenants in the Deed.

8 **V. CONTESTED FACTS.**

9 These facts are considered contested because the materiality and/or relevance of the  
10 facts are in dispute. The accuracy of the facts are not in dispute and no testimony is needed  
11 to establish the validity of these facts. This Court need only rule on whether the facts are  
12 material or relevant. If the ruling is that any of the following facts are material and/or relevant,  
13 then such fact(s) may be admitted without further testimony.

14 A. Facts Deemed Material By Smith.

15 1. In the past three months, Lebcon has twice offered Smith space in the  
16 Mall for use for a Panera Bakery and Cafe.

17 2. WSG had previously contacted the Debtors about purchasing the  
18 Property.

19 3. A couple of days prior to the hearing on the Sale Motion, WSG was  
20 advised by its broker of the Sale Hearing.

21 4. At the time of the Sale Hearing, Smith was ready, willing and able to  
22 increase the offer. If need be, Smith would have bid more than \$825,000.

23 5. Smith and the Debtors amended the Sale Agreement on June 17, 1999.

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26 <sup>11</sup> The letter giving notice is stipulated into evidence as Exhibit M.

1                   6.     Smith is now ready, willing, and able to close the purchase of the  
2 Property.

3                   7.     Lebcon and WSG entered into an agreement whereby WSG is to acquire  
4 the Property.

5           B.     Facts Deemed Material By Lebcon and WSG.

6                   1.     The overtures to Smith regarding locating in the Mall were made by  
7 Lebcon based upon Smith acquiring the business of the current bakery tenant, Atlanta Bread  
8 Company.<sup>12</sup>

9                   2.     Each of the Subsequent Deeds have been subject to the restrictions and  
10 conditions of the Deed, including the conveyance to the Debtors.

11                  3.     The amendment to the Sale Agreement was not provided to Lebcon  
12 pursuant to the terms and conditions of the Deed.<sup>13</sup>

13                  4.     The January 27, 1999 letter (Exhibit K) was sent pursuant to the terms  
14 of the Deed.

15 **VI.     ISSUES OF LAW TO BE DETERMINED.**

16           The following issues of law are to be determined by this Court. Certain issues stated  
17 below are included over the objection of one or more of the parties, and each party reserves  
18 the right to argue that certain issues are not in question or not properly before this Court in  
19 this action. Where there is objection to an issue, it is so noted.

20           A.     Are the issues raised by the Debtors and Smith moot because this Court, at the  
21 request of the Debtors and Smith confirmed a sale of the Property pursuant to the Sale  
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24           <sup>12</sup>     Lebcon and WSG propose this fact only in the event that this Court overrules  
25 their objection to the fact in Section V.A.1. and determines that such fact is relevant and  
26 material. In addition, there is or may be some dispute regarding this fact which could require  
testimony.

<sup>13</sup>     See Note 12 above.

1 Agreement which was specifically conditioned on and contemplated a waiver or exercise of  
2 the right of first refusal and other restrictions contained in the Deed?

3 B. Have the Debtors and Smith waived their right to contend that the sale of the  
4 Property was free and clear of the right of first refusal because of the provisions of Paragraph  
5 23 of the Purchase Agreement between Smith and the Debtors?

6 C. If Smith and the Debtors have waived their right, should the sale be confirmed  
7 to Lebcon pursuant to the exercise of its right of first refusal with respect to the Property?

8 D. If there was no waiver, is the sale of the Property void because of the failure of  
9 the Debtors to provide notice to Lebcon of the Debtors' intent to attempt to sell the Subject  
10 Property free and clear of security interests, liens, claims and encumbrances?

11 E. Is the sale of the Subject Property, void because of the failure of the Debtors to  
12 give notice to Lebcon of the date and time of the hearing in this Court of the sale of the  
13 Subject Property to the Smith?

14 F. Is the right of first refusal in the Deed a covenant running with the land?

15 G. Can the right of first refusal be considered separately from the other provisions  
16 of the restrictions and covenants in the Deed?

17 H. Does this Court have the power to sell property free and clear of a covenant  
18 running with the land pursuant to 11 U.S.C. §363(f)?

19 I. If the right of first refusal is not a covenant running with the land, is it an  
20 executory contract?

21 J. If the right of first refusal is an executory contract, can it be rejected by the  
22 Debtors.

23 K. If the right of first refusal is an executory contract rather than a covenant running  
24 with the land, is notice and a hearing required by 11 U.S.C. §365 before the right of first  
25 refusal can be rejected?

26 L. Whether WSG's use of the right of first refusal is proper.



- 1 M. Whether Lebcon properly exercised the right of first refusal.
- 2 N. Whether Lebcon may assign its rights under the Sale Agreement to WSG.<sup>14</sup>
- 3 O. Whether the sale of the Property to WSG or Lebcon may be approved by the
- 4 Court without further notice and hearing pursuant to Bankruptcy Code §363(b).

5 **VII. LIST OF TRIAL EXHIBITS.**

6 The parties stipulate that the following exhibits may be admitted:

- 7 A. Limited Warranty Deed dated July 6, 1993, from Lebcon as grantor to Don Poole
- 8 as grantee.
- 9 B. Limited Warranty Deed dated August 31, 1993 from Don Poole as Grantor and
- 10 Roasters Corporation as Grantee.
- 11 C. Deed dated October 11, 1996 from KRR Nashanooga, Inc. as Grantor to
- 12 BC Superior, L.L.C. as Grantee.
- 13 D. Warranty Deed dated December 6, 1996 from BC Superior, L.L.C. as Grantor
- 14 to General Electric Capital Corporation as Grantee.
- 15 E. Quit Claim Deed dated March 27, 1998 from General Electric Capital
- 16 Corporation as Grantor to BC Superior, L.L.C. as Grantee.
- 17 F. Purchase and Sale Agreement between Boston Chicken, Inc. as Seller and
- 18 David R. Smith and Becky C. Smith, as Buyer dated March 23, 1999
- 19 G. Affidavit of Ronald Gimple with Map of the Hamilton Place Mall Shopping Center
- 20 attached.
- 21 H. October 11, 1996 letter from Lebcon to Michael Black.
- 22 I. April 8, 1998 letter from Lebcon to Jim Hoar.
- 23 J. January 4, 1999 letter from Brownstein Hyatt Farber & Strickland to Lebcon.

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25 <sup>14</sup> Lebcon and WSG object to this issue since Lebcon is still the owner and holder

26 of the right of first refusal and what it may do after it acquires the property is irrelevant to this Court's determination of the issues.

- 1 K. January 27, 1999 letter from Lebcon in response to J. above.
- 2 L. April 2, 1999 letter from Brownstein Hyatt Barber & Strickland, P.C. to Lebcon.
- 3 M. May 21, 1999 letter from Lebcon to Randy Miller and Brownstein.
- 4 N. Aerial photograph of Hamilton Place Mall Shopping Center (circa 1997).
- 5 O. First Amendment to Purchase and Sale Agreement dated June 17, 1999.
- 6 P. Fifth Motion for Authority to Sell Real Property Outside the Ordinary Course of
- 7 Business Free and Clear of Liens dated April 5, 1999.
- 8 Q. Amended Certificate of Service dated April 6, 1999.
- 9 R. Order on Fifth Motion for Authority to Sell Real Property Outside the Ordinary
- 10 Course of Business Free and Clear of Liens (DE 736) dated May 12, 1999.
- 11 S. Letter Agreement between WSG and Lebcon for acquisition of the Property,
- 12 dated May 21, 1999.

13 **VIII. WITNESSES.**

14 Based upon the stipulated facts, the parties do not intend to call any witnesses.

15 However, the parties reserve the right to call the following witnesses, if necessary, during the

16 course of the trial.

17 A. Witnesses Reserved By Smith.

- 18 1. David R. Smith.
- 19 2. Becky C. Smith.

20 B. Witnesses Reserved By Lebcon and WSG.

- 21 1. Rusty Phillips and/or other representative of Lebcon -- By Telephone.
- 22 2. Eric Gordon.
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IT IS ORDERED that the foregoing Joint Pretrial Statement is hereby approved.  
DATED this \_\_\_\_ day of \_\_\_\_\_, 1999.

UNITED STATES BANKRUPTCY JUDGE

Approved as to Content  
And Form by:

STREICH LANG  
Professional Association  
One South Church Avenue, Suite 1700  
Tucson, Arizona 85701-1621

By /s/ Susan G. Boswell #4791  
Susan G. Boswell

Attorneys for WSG Development Company, Inc. and  
Lebcon Associates

John Worth, Esq.  
40 N. Central Avenue, Suite 2500  
Phoenix, Arizona 85004

By /s/ John Worth  
John Worth

Attorney for David and Becky Smith

///

1 The "Notice of Electronic Filing"  
2 generated by the Electronic Case  
3 Filing system in connection with  
4 this pleading served by e-mail this  
5 14th day of July, 1999, upon:

4 Randolph J. Haines, Esq.  
Lewis and Roca LLP  
5 40 North Central Avenue  
Phoenix, Arizona 85004-4429  
6 Attorneys for Debtors  
e-mail: rjh@lrlaw.com

7 H. Ray Stroube, III, Esq.  
8 Akin Gump Strauss Bauer & Feld, L.L.P.  
1900 Pennzoil Place, South Tower  
9 711 Louisiana  
Houston, Texas 77002  
10 e-mail: efiler@akingump.com

11 and upon those parties  
with e-mail addresses listed  
12 on the "Master Service List #10  
Dated: June 22, 1999" on  
13 file with this Court.

14 A copy of the foregoing  
was also served this 14th  
15 day of July, 1999 by U.S. Mail  
upon those parties listed on  
16 the "Master Service List #10  
Dated: June 22, 1999" on  
17 file with this Court.

18 /s/ Anita Hansen  
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